Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 49.

THE UNITED STATES, Appellants,

vs.

JOHN R. GLEASON and GEORGE W. GOSNELL,
Appellees.

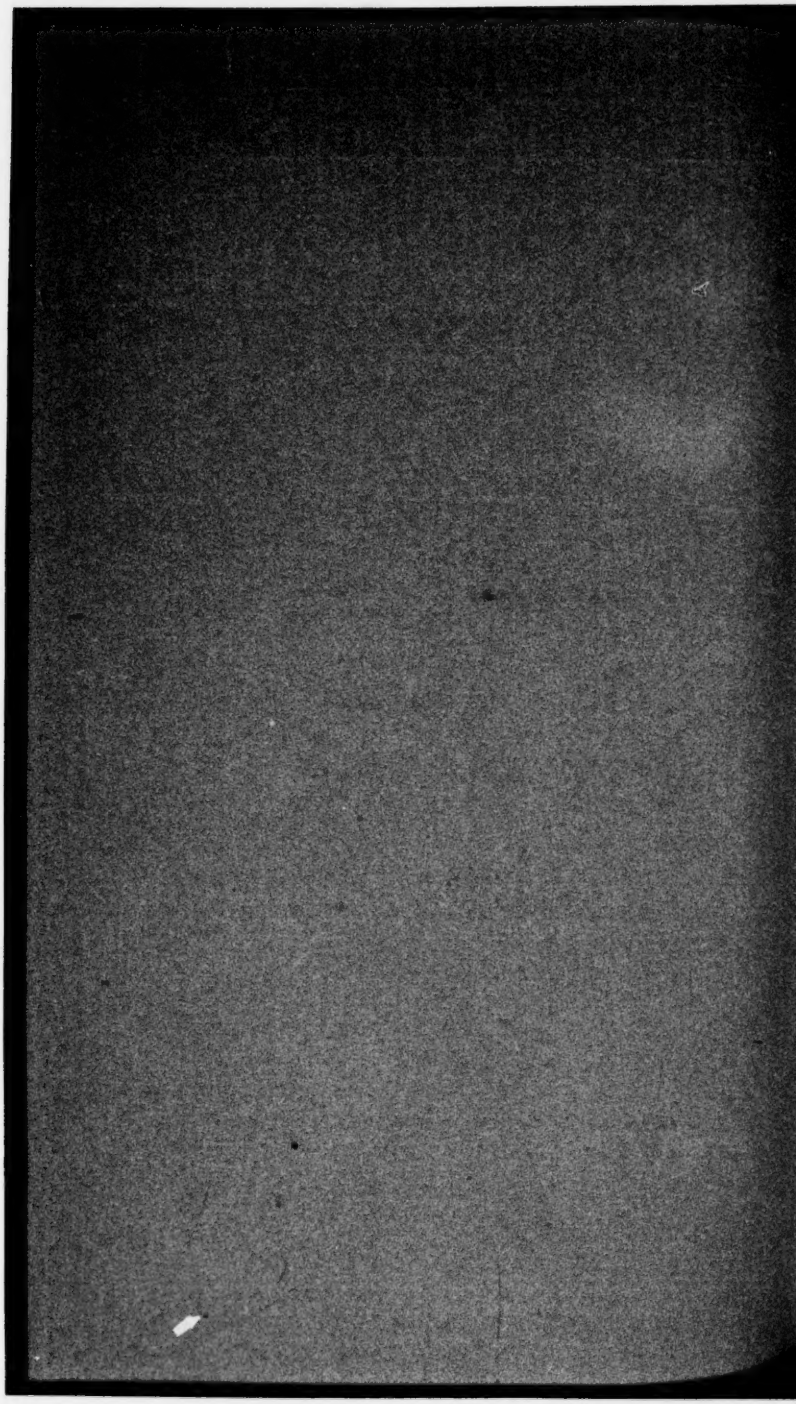
APPEAL FROM THE COURT OF CLAIMS.

APPELLEES' PETITION FOR REHEARING, AND BRIEF IN SUPPORT OF PETITION.

Temple Bodley,
H. H. Low,
Counsel for Appellees.

Francis H. Stephens,
Of Counsel.

Judd & Detweiler, Printers, Washington, D. C. 2-9-1900



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 59.

THE UNITED STATES, APPELLANTS,

vs.

JOHN R. GLEASON AND GEORGE W. GOSNELL, APPELLEES.

APPEAL FROM THE COURT OF CLAIMS.

Appellees' Petition for Rehearing under Rule 30 of this Court.

Now come the appellees, John R. Gleason and George W. Gosnell, and by their counsel petition for a rehearing of this cause before this court and say:

This suit arose in the Court of Claims for breach of two contracts by the United States, and was determined in that court in your petitioners' favor, the Court of Claims finding unanimously that the contracts were broken by the appellants, and that your petitioners' damages are (in the two

cases) $63,365 for loss of profits and $5,412.99 retained percentage. Appeal to this court was taken by the defendants below, and the case was submitted, after argument, on October 24, 1899. This court on November 6, 1899, ordered the case for reargument, which was had December 7, 1899. On January 8 an opinion was delivered affirming the judgment of the Court of Claims as to the retained percentage and reversing it as to the other items of damage. From this opinion Justices Harlan, Brown, and White dissented.

That a rehearing of the case is essential to the ends of justice, in that the opinion of this court as to certain material questions involving your petitioners' rights would be modified or changed upon further consideration, and particularly in view of the matters hereinafter set forth.

The grounds of this petition are—

1. That this court misapprehended the true meaning of the twenty-first finding of the Court of Claims.

The Court of Claims made the following finding of fact, among others:

> "No judgment or decision was given by said engineer on the question as to whether the claimants were prevented by freshets and force and violence of the elements during the season of 1888 from completing the work agreed upon within the period limited by the last extension of the contract, nor did he find or decide that the claimants were not so prevented" (Findings X, XXI).

The opinion of this court contains the following as to the meaning of the contracts in respect of the engineer's judgment:

> The contractors "were to be relieved from their contract obligation to complete the work within the time limited, only if, in the judgment of the engineer in charge, their failure so to do was occasioned by freshets or other force of the elements, and by no fault of their own."

> "The parties *agreed* that if the contractors should fail to complete their contract within the time stipulated, they *should have the benefit* of the judgment of the engineer as to whether such failure was the result of their own fault or of forces beyond their control, and, in the latter event, of his judgment as to what extension of time would be just and reasonable."

Now, while this court has construed the contracts to contain an agreement between the parties that the contractors *should have* a certain *benefit*, namely, that of the engineer's judgment whether the contractors were prevented by freshets without fault of their own, the above-quoted finding of the Court of Claims states, as a fact, that the contractors did *not have* this benefit.

The withholding of this benefit contracted for clearly constitutes a breach of the contracts, as construed by this court, if the finding of the Court of Claims, that no judgment was given by the engineer on the question of freshets, is correct—that is to say, if the finding has the real meaning which it has plainly upon its face.

In the opinion of this court, however, the finding is treated as follows:

> "The court below does indeed say, in the twenty-first finding, that 'no judgment or decision was given by said engineer on the question whether the claimants were prevented by freshets and force and violence of the elements during the season of 1888 from completing the work agreed upon within the period limited by the last extension of the contract, nor did he find or decide that the claimants were not so prevented.' But, as it was expressly alleged in the petition, and was found by the court, that, on an application for a further extension because of interruption occasioned by force of elements and not by any fault of the plaintiffs, the engineer did refuse to extend, the statement of the court must mean either that it was necessary for the engineer, in order to give efficacy

to his decision to declare in terms that it was based on a finding of fault on the part of the contractors, or that the conclusion of the engineer did not amount to a decision or judgment, within the meaning of the contract, because the court reached a different conclusion.

"These are propositions of law and not of fact, and we cannot assent to either of them."

Your petitioners admit, if the said finding of the Court of Claims can have only the two alternative meanings last above stated, that the finding is in the nature of an inference or conclusion of law and may be disregarded by this court; but your petitioners respectfully urge that said finding may have another meaning and may literally and exactly state a fact. The evidence below upon which said finding was based may have shown to the Court of Claims that the engineer *in terms and knowingly and intentionally refused to consider* the question of freshets or the question of the contractors' right to his judgment as an arbitrator or referee between the parties, and, from a mistaken idea of his duty, expressly repudiated the idea that he had under the contracts any such function as that of an arbitrator whose decision upon the question of prevention by freshets was, by the contracts, made final between the parties.

If he thus expressly refused to give the contractors what he was bound under the contracts to do, namely, the benefit of his decision upon the questions mentioned, it was a breach of the contracts, and the Court of Claims in making their twenty-first finding have correctly stated *a fact*, and if this finding be a statement of fact your petitioners submit that it must, under section 708 of the Revised Statutes and pursuant regulations by this court (3rd Wall., vii; 17 Wall., xvii), be binding upon this court and be taken to establish such fact.

Your petitioners submit that if said finding can have the meaning that the engineer did not pass upon the question

of freshets at all, either in terms or by implication, and if this possible meaning agrees literally with the finding, *such* literally agreeing meaning should be accepted to establish as a fact that the engineer did not make the decision contracted for; and it involved material error absolutely fatal to your petitioners' rights and resulting in great injustice and pecuniary loss to them to disregard and depart from the finding upon the theory that it "must mean" and could only mean the two alternative things above quoted from your honors' opinion.

This court does not care for the reasons or evidence which led the Court of Claims to make this finding, but in order to illustrate our suggestion that the finding may have, besides the two meanings stated by your honors, the third meaning above stated by your petitioners, your petitioners have attached to this, their petition, a duly certified copy of *all* the evidence in this case which was before the Court of Claims upon final hearing as to what was said and done on the occasion of the said engineer's refusal to extend your petitioners' time for completing the contracts. This evidence is printed below and is as follows:

COURT OF CLAIMS.

JOHN R. GLEASON and GEORGE W. GOSNELL
vs.
THE UNITED STATES.
} Nos. 17782 and 17783.

EVIDENCE FOR CLAIMANTS.

INDEX.

Case 17782.

Depositions of * * * Temple Bodley and John G. Simrall, taken pursuant to the annexed commission on the substituted interrogatories thereto attached, before me, Alonzo Walker, special commissioner and a notary public in and for Jefferson county and State of Kentucky, on the 17th day of June, 1895, at the office of Walker, Christey & Avey, in the Louisville Trust Company building, in Louisville, Ky., to be read in evidence in behalf of the claimants at the trial of said case.

* * * * * * *

TEMPLE BODLEY, being first duly sworn by me, in answer to the annexed interrogatories saith:

1 Interrogatory. State your name, age, residence, and occupation; whether you have any interest in this suit or claim; whether you are related by blood or marriage with the plaintiffs or either of them, and whether you have any suit or claim against the United States.

Answer. My name is Temple Bodley; age, 42; residence, Louisville, Ky.; occupation, lawyer; I have no interest in this suit or claim; am not related by blood or marriage with either of the plaintiffs, and have no suit or claim pending against the United States. I have been and am counsel for the plaintiffs, and have been their legal adviser for many years past.

2 Interrogatory. Do you know the plaintiffs and the work of excavation which they prosecuted in the bed of the Ohio river, opposite Louisville, in the years 1886, 1887, and

1888? Have you ever acted as their counsel; and, if yea, for what purpose?

Answer. I do; and have acted as their counsel.

3 Interrogatory. Whether, prior to December 31, 1888, in behalf of the said Gleason & Gosnell, you requested Major Stickney, the United States engineer in charge of the work, to extend the time for completing the work; and, if yea, for what purpose or upon what grounds you made such request, and did he take any action upon such request?

Answer. In the latter part of the year 1888 the plaintiffs came to me and my partner, Judge Simrall, and requested us to see Major Stickney, who was then the engineer in charge for the United States Government of the work of enlarging the canal basin mentioned in the pleadings in this case, for the purpose of securing an extension of time under their contract for that enlargement. Judge Simrall and I went to see Major Stickney, and we represented to him the difficulties which the plaintiffs had met in the performance of their contract, and the impossibility of their completing the work of enlargement in accordance with the contract, and within the time which (with extensions) had been allowed them, namely, up to the 31st day of December, 1888. We were endeavoring to show him that it was utterly impracticable by reason of the floods or freshets in the Ohio river, and the inundation of the place where the work was to be carried on, for the plaintiffs to carry on the work or to complete it in the time allowed, and specially asked him to grant them an extension in accordance with that part of their written contract with the Government (which, or a copy of which, is filed in this case, marked Exhibit A, with the plaintiffs' petition), and in view of these facts, and many others which we cited to the same effect, we urged upon him that it was his right and duty to exercise a fair judgment upon the question, whether the plaintiffs were or not entitled to a reasonable extension of the time to complete the work under their contract, when he interrupted us and remarked that he had nothing to do with deciding any such question between the Government and the plaintiffs; that he did not occupy the position of a judge or arbitrator; that he had nothing to do with the question whether justice or fair dealing required an extension of time for the plaintiffs to complete the work under their contract, but that it was his business only to look after

the interests of the United States Government in the work, and that because he considered it would be to the interest of the Government to refuse to grant plaintiffs an extension of time to complete their work, he did then refuse to extend that time. I read to Major Stickney that part of the contract before referred to, which provided that "if the party or parties of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented, either from commencing or completing the work, or delivering the materials, at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion, as in the judgment of the party of the first part, or his successor, shall be just and reasonable," etc. And I earnestly urged that it was the plain intention of this contract, and his duty if (as he did not deny) the freshets and violence of the flooded river plainly made it impossible for the plaintiffs to complete their work under the contract within the time which had been allowed them (namely, to the end of the year 1888), to grant them "such additional time * * * for such completion as in (his) judgment shall be just and reasonable." He did not deny that the freshets had prevented the completion of the work, and made it impossible for the plaintiffs, or any one, to complete it within the time allowed them, but he answered summarily that he was not going to do anything but look after the interests of the United States Government alone; that he considered that those interests would be better subserved by taking away the contract from the plaintiffs and not allowing them more time, and having the Government do the work itself; that he had nothing to do with any question of justice between the Government and plaintiffs, and therefore he refused to give any extension of time whatever. I will add that Major Stickney said that in some particulars, which he mentioned, plaintiffs had not done all that they agreed to do, and further, that it is, of course, impossible for me to remember his exact language, but there can be no doubt that I have stated the substance of what occurred and was said. Both Judge Simrall and I felt keenly the injustice of Major Stickney's position in reference to determining whether an extension was just or reasonable, but finding that reasoning was useless, we left him. This is about all that occurred. We told Major Stickney, and, of

course, he understood that we were acting as counsel for the plaintiffs in asking for the extension of time.

4 Interrogatory. If he acted upon such request for extension, whether at the time of such action you had any conversation with Major Stickney touching such extension, and if yea, what was his conversation, or what statement or declaration did he make relating to such extension, or to his action upon your request?

Answer. My answer to this interrogatory is fully set forth in my answer to interrogatory 3.

5 Interrogatory. If he acted upon such request for extension, whether at the time of such action you had any conversation with Major Stickney touching his powers and duties under the said contract; and if yea, what statement or declaration did he make relating to his powers or duties under the said contract with reference to his action upon a request for an extension of time for completing the work?

Answer. My answer to this interrogatory is fully set forth in my answer to interrogatory 3.

6 Interrogatory. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer as if you had been particularly interrogated thereunto.

Answer. I do not know of any other matter or thing, and cannot say anything touching any of the matters in question in this cause that may tend to the benefit or advantage of the plaintiffs or defendant in this cause besides what I have answered.

TEMPLE BODLEY.

JOHN G. SIMRALL, being first duly sworn by me, in answer to the annexed interrogatories saith:

1 Interrogatory. State your name, age, residence, and occupation; whether you have any interest in this suit or claim; whether you are related by blood or marriage with the plaintiffs, or either of them; and whether you have any suit or claim pending against the United States.

Answer. My name is John G. Simrall; residence, Louisville, Ky.; occupation, lawyer; age, 55; I have no interest

in this suit or claim; am not related to either of the parties, and have no suit or claim pending against the United States.

2 Interrogatory. Do you know the plaintiffs and the work of excavation which they prosecuted in the bed of the Ohio river opposite Louisville, in the years 1886, 1887, and 1888; have you ever acted as their counsel, and if yea, for what purpose?

Answer. Yes.

3 Interrogatory. Whether, prior to December 31, 1888, in behalf of the said Gleason & Gosnell, you requested Major Stickney, the United States engineer in charge of the work, to extend the time for completing the work; and if yea, for what reason or upon what grounds you made such request; and did he take any action upon such request?

Answer. I had several interviews with Major Stickney during the latter part of December, 1888, and January, 1889, as to granting the extension on the ground that the completion of the contracts in the time provided had been made impossible by overflows of the works, and sudden freshets, and acts of God, over which Gleason & Gosnell had not and could not have any control. He maintained that under the contract he had a right to cancel it, it mattered not what obstructions prevented the completion of the work in the time specified; that it was a matter entirely in his discretion. We urged upon him that his position, under the terms of the contract, was that of an umpire, or arbitrator, or judge, between the Government and the contractors, and that the fact was indisputable that the delay had been occasioned by the act of God, without the fault of the contractors, and it was his duty to grant the extension. He treated the idea that he was to act as an umpire, or arbitrator, or judge as absurd. He said that he was acting solely as the agent of the Government, and the contractors had to look out for themselves. He said the contract provided that he might do it, but that was a discretion which he would exercise only for the benefit of the Government. I told him that I had, as judge of the law and equity court, had considerable experience in construing contracts, and that I understood the courts to hold that the word "may," as used in this contract, will be construed to mean "must," and that really under the proof in this case (that the delay was occasioned by the act of God) that he had no discretion in the matter, but was bound as a matter of law to grant the

extension. He told me that this was a Government matter, which he understood better than I did. I then appealed to him as a matter of justice, and said that this was a great Government, and could not afford to confiscate and take over $100,000 of private property for public use without compensation and bankrupt two of her good citizens. He said he had nothing to do with that; that they could have their redress through the courts. He said further that he had always thought that such work could be done better by the Government than through the agency of contractors, and that he now had an opportunity to take charge of this work and do it himself for the Government by employing such force from time to time as was needed, and he intended to do it. He said it was his duty to consider the interests of the Government alone.

4 Interrogatory. If he acted upon such request for extension, whether at the time of such action you had any conversation with Major Stickney touching such extension; and, if yea, what was his conversation or what statement or declaration did he make relating to such extension or to his action upon your request?

Answer. He did, and I had conversations with him touching such extension, as fully set out in my answer to interrogatory No. 3, which is made a part of the answer to this interrogatory.

5 Interrogatory. If he acted upon such request for extension, whether at the time of such action you had any conversation with Major Stickney touching his powers and duties under the said contract; and, if yea, what statement or declaration did he make relating to his powers or duties under the said contract with reference to his action upon a request for an extension of time for completing the work.

Answer. He did, and I had conversations with him same as stated in answer to interrogatory No. 3.

6 Interrogatory. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer as if you had been particularly interrogated thereunto.

Answer. I know of nothing else touching the matters in

question in this cause that may tend to the benefit of either party except what I have stated.

JOHN G. SIMRALL.

COURT OF CLAIMS.

I certify that the foregoing printed pages, numbered from one to six, inclusive, are true copies of testimony in the aforesaid cause, and formed part of the record as the same appeared to the Court of Claims when the cause came on to trial.

Test this 8th day of February, A. D. 1900.

[SEAL.] JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

COURT OF CLAIMS.

GLEASON & GOSNELL
vs.
THE UNITED STATES. } No. 17782.

EVIDENCE FOR DEFENDANT.

Extract from Deposition of Col. Amos Stickney, for Defendant, Taken at Louisville, Ky., on the 9th Day of February, A. D. 1895.

Defendant's counsel, George H. Gorman, Esq.; claimants' counsel, H. N. Low and Temple Bodley.

Col. AMOS STICKNEY, a witness produced on behalf of the United States, before any questions were put to him, was duly sworn to tell the truth, the whole truth, and nothing but the truth, touching the matters at issue in said cause. Said witness thereupon, in answer to questions put to him by the notary, testified that his name is Amos Stickney; age, a little over 50 years; a resident of Cincinnati, Ohio, at the present time; by occupation a lieutenant colonel of engineers in the United States Army; that he has no interest, direct or indirect, in the subject-matter of the suit; that he is in no degree related to the plaintiffs, and that he has no suit or claim pending against the United States.

Thereupon the said witness, in response to interrogatories propounded to him by counsel, testified as follows:

* * * * * *

Cross-examined by Mr. H. N. Low:

* * * * * * *

157 question. As engineer in charge of this work under this contract with Gleason & Gosnell, what did you consider to be your duty?

Answer. My duty was to supervise their work and see that it was done in accordance with the contract, and, when it was so done, make payments to them in accordance with the contract.

158 question. Did you have any other duty?

Answer. I don't know that I can answer that question, other than to say that I had general charge of the work, and it was my duty to see that the interests of the Government were served, as the officer in charge of the work.

159 question. Did you regard that you were looking after the interests of the Government in refusing the last extension for which these contractors applied?

Answer. I did.

160 question. What about the interests of the contractors?

Answer. I had nothing to do with the interests of the contractors, any further than to see that the obligations of the Government to them were carried out.

161 question. At the time when this extension was applied for did you not positively disclaim any duty with respect to the interests of these contractors?

Answer. The extension that was granted, do you mean, or the extension that was not granted?

162 question. The last extension applied for that was not granted.

(Counsel for the Government objects on the ground of its immateriality and incompetency.)

Answer. I don't remember that the question was ever brought up.

163 question. Did you not, in conversation with Mr. Bodley and with Judge Simrall, at the time when they made application on behalf of these contractors for this last extension, which you refused, state positively that your only duty was to take care of the interests of the Government, and

that you had nothing to do with the interests of these contractors?

(Same objection.)

Answer. It is quite possible that I did, though I don't remember it.

164 question. Will you state whether or not that was your sentiment at that time, if it is possible that you made such a statement to them?

(Same objection.)

Answer. My idea at the time that this last extension was asked was that the interests of the Government which were in my charge required that the contract should not be further extended. The interests of the contractors, it appears to me, were not in my keeping in any way, further than to see that the obligations of the Government to them were fulfilled, and it is probable that that was my sentiment at the time. I had given these contractors as much indulgence as I thought was warranted.

165 question. Did you not, in the conversation with Mr. Bodley and Judge Simrall, to which I have just referred, state positively that you had no duty or obligation so far as the interests of these contractors were concerned?

(Same objection.)

Answer. I really can't remember, as that conversation occurred some five years ago.

166 question. Is it possible that you did?

(Same objection.)

Answer. It is possible; yes, sir.

167 question. Is it probable?

(Same objection.)

Answer. Well, I can't say that.

(At this point counsel for the Government desires to reiterate the objection which he made in the beginning of this cross-examination, to wit, that he objects to all questions and answers in this cross-examination which do not strictly pertain to matters concerning which the witness was examined in chief, and counsel does not feel at liberty to put the Government to the expense of obtaining testi-

mony in this manner. He submits that if counsel for the plaintiffs desired the testimony of this witness upon these matters it was his duty to call the witness as his own and examine him upon them, and therefore counsel gives notice that he will move the court to strike from the files all testimony of this and all other witnesses given in cross-examination, unless such cross-examination was upon matters on which the witnesses had been examined in chief, and will move the court to tax the cost of taking such testimony on plaintiffs.)

Redirect examination by Mr. GORMAN:

168 question. Colonel, from your knowledge of the character and method of construction of the Government cross-dam, concerning which you testified in the early stages of your direct examination, and from your professional knowledge as an expert civil engineer, have you any doubt that said cross-dam was constructed for the purpose of holding the water up at low stages of the river and inducing it to flow into the canal for the purpose of facilitating navigation?

Answer. I have no doubt whatever that the cross-dam was built for the purpose of holding up the water so as to make a greater depth in the canal and in the river above during low stages.

169 question. Is it at all necessary for you to have seen the dam when it was constructed, or had to do with its construction, in order to possess this information?

Answer. It would not be necessary for me to have had anything to do with the construction of the dam to have my opinion backed up by my understanding of the purpose of the dam.

170 question. I understood you to testify, in answer to a question in cross-examination, when you were giving various definitions of the word "dam," that a dam which is used to prevent water from flowing into an adjacent area is called a coffer-dam. Am I correct in that?

Answer. Usually; yes, sir.

171 question. Is this Government cross-dam a coffer-dam?

Answer. It is not.

Recross-examined by Mr. H. N. Low:

172 question. Doesn't this dam prevent the flow of water into the adjacent area at low stages of the river?

Answer. Not entirely. At very low stages it prevents a large portion of the water from flowing into it.

Examined by the NOTARY:

173 question. Do you know anything further about this matter that you haven't stated that you desire to state?

Answer. I probably did know considerably more concerning the details of this matter when it was fresh in my memory. As it has been some five years now since the expiration of this contract and some four years since I left this District, there are many of the details that are not now in my mind, and in this connection I desire to say that in my testimony I have not pretended to be exact with regard to small details where my memory did not serve, but the main facts of the case I remember with perfect distinctness.

And thereupon the witness signed his name.

AMOS STICKNEY,
Lieutenant Colonel of Engineers, U. S. A.

COURT OF CLAIMS.

I certify that the foregoing are true extracts from the deposition of Amos Stickney, filed in the above-entitled cause, which deposition formed part of the printed record when case came on to trial before the Court of Claims.

Test:

This 8th day of February, A. D. 1900.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

The witnesses Bodley and Simrall were uncontradicted and unimpeached, and established for the Court of Claims the fact that the engineer did not give his judgment as contracted for. The reason for this was that he abdicated his contractual duty as arbitrator, and when he did act in

merely refusing additional time, acted only as a party to the contract and agent of the United States.

The testimony of Colonel Stickney, the engineer in charge, is also given above as to his idea of his duty under the contracts and as to what occurred on the occasion of his refusal to allow the contractors additional time, and his evidence is in substantial agreement with that of Messrs. Bodley and Simrall.

The engineer thus not only refused additional time, but also refused to give his judgment as arbitrator upon the questions on which your petitioners, according to your honors' opinion, had contracted for and had a right to his judgment.

This court will see at once that the decision of the circuit court of appeals for the seventh circuit in the case of The Crane Elevator Company *vs.* Clark, 80 Fed. Rep., 705, seemed to the Court of Claims to contain a clear statement of the law applicable to this case. In that case the circuit court of appeals said:

> "The parties have, however, a right to demand that the umpire shall, with respect to every matter submitted to his determination, exercise an independent and honest judgment, and that he shall not arbitrarily refuse to accept performance or to give a certificate. * * * But arbitrary refusal to determine the fact, or arbitrary refusal to accept performance, constitutes a fraud in the law, availing to dispense with the necessity of his judgment as a condition precedent to the right of recovery by the contractor" (p. 708).
>
> "He entertained an erroneous idea of his duty" (p. 709).
>
> "He was a judge between the plaintiff and the defendant, and it was his duty to investigate and decide."

The above decision was rendered after full consideration of and was based upon the decision of this court in the case

of Kihlberg *vs.* United States, referred to in your honors' opinion, and appears in every way consistent therewith.

As to this ground of rehearing, your petitioners ask leave to refer to the annexed brief.

2. Your petitioners respectfully urge, as the second ground of this petition, that the matters appearing in the record on this appeal do not warrant the presumption that the engineer included in his mere refusal to grant additional time a decision on the question of prevention by freshets without fault of the contractors.

While in your honors' opinion it is inferred that a decision that the contractors were not prevented by freshets must be presumed to have been embraced in the engineer's mere refusal to extend the time, your petitioners respectfully call the attention of this court to three considerations:

First. The refusal to extend time may have been *merely as party* to the contract, and *not at all as arbitrator.*

The engineer could, whether for a sufficient or an insufficient reason, refuse additional time, and do this in his capacity as party to the contract. If he did this for the mere purpose of taking the work out of the contractors' hands and doing it himself, nothing can be inferred or presumed from such mere refusal of additional time as to whether he had formed any judgment on the question of freshets or whether he had given to the contractors the benefit of his judgment on that point, which benefit your honors hold was contracted for.

Second. The engineer's finding or decision or judgment as to the freshets *was that there were freshets.* This positively appears in the official reports (finding VII) sent by this engineer to Washington to the Chief of Engineers and quoted in your honors' opinion on pages 4 and 5. (See opinion of Court of Claims, Rec., p. 47.)

Moreover, these reports show that the freshets were so high and continuous as to leave practically no working time during the entire season, and carry with them the conclusion and amount to a finding that the contractors, no matter how faultless, were prevented by forces beyond their control from performing the work during the contract period, which consisted of the season of 1888. The very highest degree of human diligence could not have availed against such freshets.

Your petitioners urge that these reports preclude or estop said engineer officer from being heard to say or decide that the contractors were not prevented by freshets during said season.

Still more do these reports preclude the *presumption* that a decision that there were no freshets was involved in his mere refusal to grant additional time.

Third. If such a presumption does arise it certainly is rebuttable (on which point your petitioners ask leave to refer to the annexed brief), and the twenty-first finding of the court below shows that it has been rebutted.

3. Your petitioners respectfully submit as the third ground of their petition that this court should again consider their ruling that the engineer had the right to base his refusal to extend partly upon faults of the contractors during periods prior to the last extension; and as to this ground your petitioners ask leave to refer to the annexed brief.

4. Your petitioners urge as the fourth ground of their petition that this court in construing the contracts should have given great weight to the contemporaneous construction placed upon them by the parties in practice, which does not appear from the opinion to have been done.

According to the practice of the parties, in no instance did the engineer grant an extension. Every extension, including two expressly on account of freshets (in the case of the

lower work), was granted by the Chief of Engineers (Chicago *vs.* Sheldon, 9 Wall., 54).

PRAYERS.

Wherefore your petitioners pray:

First. That this honorable court may order a rehearing of this cause, especially in order that the true meaning of the twenty-first finding may be again considered, as well as the other material matters and things in this petition stated.

Second. That if this honorable court be of the opinion that there can be any doubt as to the true meaning of the twenty-first finding, a rehearing may be granted, and, pending such rehearing, the cause be remanded to the Court of Claims with directions to make said finding more precise in such particulars as this court shall specify, or to find the immediate facts (but not the evidence) upon which the twenty-first finding is based.

Third. That such other relief may be granted your petitioners as shall seem proper to this court.

JOHN R. GLEASON,
GEORGE W. GOSNELL,
Petitioners,
By TEMPLE BODLEY and
H. N. LOW,
Attorneys and Counsel for Petitioners.

FRANCIS H. STEPHENS,
Of Counsel.

I have examined the questions submitted upon the foregoing petition for a rehearing, and believe them to be of merit and to justly warrant the granting to the appellants of a rehearing of this cause by the Supreme Court of the United States; and I certify that this petition is made in good faith and not for purposes of vexation or delay.

FRANCIS H. STEPHENS.

WASHINGTON, *February* 9, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 59.

THE UNITED STATES, APPELLANTS,

vs.

JOHN R. GLEASON AND GEORGE W. GOSNELL, APPELLEES.

APPEAL FROM THE COURT OF CLAIMS.

Brief in Support of Appellees' Petition for a Rehearing.

We believe that rule 30 is intended to prevent a failure of justice to any suitor of this court arising from oversight or inadvertence of the court, and may be invoked in a case, like the present, of little general importance to the public, though of very great moment to your petitioners.

Although the decision of this case involves the all of our clients, it has been so patiently heard by the court that we should not feel justified in asking a reconsideration of it but for two considerations. We believe the opinion of the

majority is founded upon a misapprehension of vital facts in the record, and that we may be able to make this clear. Again, the fact that three members of the court are of our view persuades us that in essaying to present our reasons for a reconsideration we shall not be thought unduly persistent.

As we read the opinion, these five propositions are held:

First. That the freshet proviso vests the engineer with the discretion to judge for both parties to the contract not only what amount of time would be just and reasonable to be allowed the contractors in case of prevention by freshets, without fault of their own, during the last period of extension, but also of the question whether they were in fact so prevented.

Second. That the *bona fide* decision of the engineer upon these questions was final.

Third. That the contractors had the contract right to such a decision.

Fourth. That the engineer did render such a decision adversely to the claim of an extension.

Fifth. That the engineer had the right to base his refusal to extend partly, but not solely, upon faults of the contractors during periods prior to the last extension.

I.

We propose to here discuss the last two of these propositions. We think we shall be able to show that no such decision as the court holds the engineer made was ever made. If this contention be sound, it will render unnecessary any further construction of the freshet proviso in the contract; for if the engineer did not in fact give the judgment which this court declares the contractors had con-

tracted for, there is no occasion to determine the limit of his power to decide nor the good faith of a decision which he never rendered.

We strongly contended for this proposition on the hearing and in our brief, although the greater part of our arguments were addressed to the construction of the freshet proviso; but because the question of construction was not only fully argued by us, but presumably in the consultation of the members of the court also, and because the opinion expresses an adverse construction without any definite discussion of the terms of the proviso or the other parts of the contract throwing light upon it, we propose, as we said, to proceed to the discussion of the last two above propositions held by the court, viz., *first*, that the engineer did render a *bona fide* decision upon the question whether the contractors were prevented from completing their work during the period of the last extension by freshets and by no fault of their own; and, *secondly*, that the engineer was warranted in basing his refusal to extend in part but not solely upon the ground of faults prior to the last extension.

We have said the opinion decides that the contractors had the contract right to a decision by the engineer upon the question whether they had been prevented from completing their work within the period of the last extension by freshets and no fault of their own. After quoting the opinion of the Court of Claims to the effect that the engineer was not made judge of the fact of prevention by freshets, but only of the amount of additional time to be allowed the contractors in case of such prevention, your honors say:

> "We cannot accept this exposition of the language as sound. Rather do we interpret it to mean that, as between the United States and the contractors, the latter were to be relieved from their contract obligation to complete the work within the time limited, only if, in the judgment of the engineer in charge,

> their failure so to do was occasioned by freshets or other force of the elements, and by no fault of their own; and that, if and when, in his judgment, the failure to complete was, in point of fact, due to the extraneous causes, he was also to decide what additional time should be just and reasonable. In other words, the parties agreed that if the contractors should fail to complete their contract within the time stipulated, they should have the benefit of the judgment of the engineer as to whether such failure was the result of their own fault or of forces beyond their control, and, in the latter event, of his judgment as to what extension of time would be just and reasonable."

The contract right of the contractors to "*have the benefit* of the judgment of the engineer" on the question of prevention by freshets without fault is thus unmistakably declared. It seems also a plain requirement of law and was expressly conceded by counsel for the Government (Brief, p. —).

But was such a judgment ever given, as the court holds it was? If it was not, there has been a plain breach of the contract. Whether it was or was not given is, we submit, a question of fact. Such a question it is the province of the trial court alone to decide. If the contractors had the contract right to have the judgment of the engineer given, then we submit they have a right to prove that it never has in fact been given, and to have the trial court determine, as a matter of fact, whether it has or has not been given. We say "as a matter of fact," for we not only are unable to conceive how the question whether a judgment has been given can be any other than a question of fact, but we do not understand the opinion to hold differently. Whether any tribunal has given a judgment and what that judgment is, are, we think, always questions of fact to be pleaded and proved. In case of a judgment of record, both its existence and its nature will be proved by the record. In other cases, whether a judgment has been given and what it is will be

proved according to the rules of evidence; but in all cases it is proven as a fact. It may be true that the rendition, existence, or nature of a judgment may, like any other fact, be presumed from some other fact proven, and this presumption may be one of fact or one of law; but in all such cases the presumption is based upon facts alleged and admitted or proven.

Now, the opinion evidently means that the engineer's *refusal* gives rise to the presumption that he did decide the question whether the contractors were prevented from completing the work in 1888 by freshets without fault of their own. We need not dispute this proposition. We shall refer to it later; but the opinion, as we read it, goes further and holds that this presumption is *conclusive*. This, we respectfully urge, is error.

We might concede that when the fact is established and admitted that the engineer did refuse to extend the time for completion there is a legal presumption that he did all that was necessary to warrant his refusal; that he did, in fact, give the required decision; that he did (as your honors say, "the parties agreed") give the contractors "the benefit of (his) judgment as to whether such failure was the result of their own fault or of forces beyond their control;" but we submit that on principle and under the authorities this presumption was not a conclusive one, but may be rebutted by proof.

Let it be observed that we are not denying the *finality* of his decision, nor the *honesty* nor the *correctness* of his decision, but the *fact* of his decision. We concede that the engineer, under your honors' construction of the freshet proviso, had *power* to judge for both parties whether there was prevention by freshets; we may concede that if he *gave* such a judgment it was honest and final; we may concede also that from his mere *refusal* to extend a presumption arises that he did give such a judgment; but we deny that

this presumption cannot be overcome by proof of the fact that he never did so judge at all.

That such a refusal to extend is not necessarily tantamount to such a decision is clearly shown by the fact that the engineer, although he may not act or profess to act as an arbitrator, but only *as one of the parties to the contract*, may so refuse. It is clear and it was conceded on argument that in case the engineer decided that the contractors should have additional time, the time was to be "allowed them in writing" by the United States as real party to the contract, acting through its authorized agent. If, then, the United States, acting through its authorized agent, could as a matter of fact make such allowance, so as a matter of fact it could refuse it. This is but saying that the engineer, in his capacity as nominal party to the contract, representing the Government, might in fact have refused the extension *in that character*, in which he could not claim to judge the question of prevention for the contractors, as well as in his other character of arbitrator, in which he had authority to judge it. If so, it follows that from the act of refusal either of two alternative and inconsistent conclusions may be presumed to follow, namely, (1) that his act in refusing was as arbitrator or (2) that it was as a party—that is, of course, as a nominal party acting for his principal, the Government. In the first alternative, his act might or might not be tantamount to a conclusive judgment. In the second, it certainly could not be. And yet this court in its opinion (without warrant in the findings, we respectfully submit) presumes, *first*, that the act of the engineer in refusing an extension was not as a mere party, but as arbitrator, and, *secondly*, from such presumption of refusal by the engineer as arbitrator it builds another and conclusive presumption that he has decided the question as to prevention by freshets without fault.

With the single fact of a mere refusal to extend as the basis for the conclusion that the engineer ever gave any such

judgment, the opinion in numerous places assumes that the judgment was given. It says: "The fallacy, we think, in the position of the court below was in assuming that it was competent to go back of the judgment of the engineer and to revise his action by the views of the court." We think we shall be able to show, on the contrary, that the opinion is not warranted, in that it erroneously assumes that there was such a "judgment of the engineer" for the lower court "to go back of." Under the theory that there is a conclusive presumption of law that the engineer must have decided all that was required by the contract to warrant his refusal (in other words, that he must have given a judgment on the freshet question for the benefit of which your honors say "the parties agreed"), it matters not how certain it may be that the engineer never did in fact give such a judgment, the contractors cannot show the truth.

The extremest supposable case may have existed. An extreme case is conclusively established by the findings here. Although unprecedented and continuous floods may have made any work whatever during the last extension plainly impossible; although the contractors may have been most diligent in preparation for the work and have done everything possible to be done; although the engineer may have even said that he did not and could not judge that they had been in fault or had not been prevented solely by the floods; although he may have thought and declared that he had no duty to judge between the parties, but only to look after the interests of his principal; although he may have declared this verbally, in writing, or in his official reports, still the law shuts off all inquiry into the truth and conclusively presumes *not* merely, mark, that the engineer was honest in what he did, but that he did in fact *do* exactly what he did not do and declared he did not do.

We do not understand this to be the law.

Wharton (who uses the term "presumptions of law" in

the sense generally meant by "irrebuttable or absolute presumptions"—that is, conclusive presumptions) says:

> "It is sometimes said that the law presumes that public officers do their duty. The law, however, presumes nothing of the sort. If a public officer is sued for misconduct, then the case goes to the jury on the evidence, there being no presumption of virtue in his favor sufficient to outweigh preponderating proof on the other side. What the law says, and all that it in this respect says, is that a public officer is so far assumed *prima facie* to do his duty that the burden is on the party seeking to charge him with misconduct. And this is in full harmony with the general rule above given, that on the actor lies the burden. The same reason applies in cases where the conduct of the officer comes collaterally in question. The burden is on those assailing such conduct; and so far, but only so far, the conduct of such officer is *prima facie* presumed to be right. * * * When the facts go to the jury, there is no more a presumption of law in either case that the officer did right than there is that a presumption of law that the private person did right" (2 Wharton Evidence, sec. 1320).

> "The award must be coextensive with the submission. All matters submitted must be considered and decided upon by the arbitrators; and an award which disposes of only part of the subject-matter of the submission will be void. The omission must be *proved* by the party assailing the award, or it must appear upon the face of the award. In the absence of proof it will be presumed that all matters submitted were considered and passed upon."
>
> 1 Am. & Eng. Encyc., 693 and 694, citing many cases.

If proof is admissible to show that an award which has been made was not based on a consideration and decision of all the questions submitted, *a fortiori* proof is admissible to show that the award was never made at all.

In support of the proposition that the facts can be shown as to what an arbitrator has decided, even when it is an established fact that he did render a decision, see 1 Wharton on Evidence, section 599, discussing the question at length. Of course, we need not contend so far if there was in this case really no such decision.

> "All matters submitted to arbitration are presumed to have been passed on in making the award *unless the contrary be affirmatively shown*" (*id.*, Fooks *vs.* Lawson, 40 Atl. Rep., 661).

Surely the engineer, in refusing an extension, even if he could be legally presumed to have acted in his character as arbitrator and not as a party, cannot be more conclusively presumed to have done what he should have done than a public officer; and yet there is no such conclusive presumption even as to a public officer. Observe that we are not contending that we have any right to inquire into his acts within the sphere of his judgment, as authorized by the contract. We now merely contend that there is nothing in this record to show that he ever himself entered that sphere.

It is clear, and your honors hold, that "the parties agreed that (the contractors) should have the benefit of the judgment of the engineer as to whether such failure was the result of their own fault or of forces beyond their control."

Again, the opinion says:

> "We do not wish to be understood to say that it would have been competent for the engineer in charge, if in his judgment the contractors had been duly diligent during the period of the last extension and had acted up to the conditions upon which such extension was granted, to have based his refusal for a further extension upon the *sole* ground that there had been delinquencies during the prior periods of extension. We mean merely to say that, in a *bona fide* exercise of the discretion conferred upon him, that officer might properly observe the conduct of the contractors through the entire scope of their past

> action, in deciding what weight to give to their promises as respected the future, and consider whether previous grants of extension had brought forth such efforts on the part of the contractors as the circumstances required."

Now, the Court of Claims has found as facts that "No JUDGMENT OR DECISION WAS GIVEN BY SAID ENGINEER ON THE QUESTION AS TO WHETHER THE CLAIMANTS WERE PREVENTED BY FRESHETS AND FORCE AND VIOLENCE OF THE ELEMENTS DURING THE SEASON OF 1888 FROM COMPLETING THE WORK AGREED UPON WITHIN THE PERIOD LIMITED BY THE LAST EXTENSION OF THE CONTRACT, nor did he find or decide that the claimants were not so prevented," and that he "based his refusal to further extend the contract because, as he asserted, the claimants had for a number of seasons failed to complete the work within the times agreed upon" (Findings X, Rec., p. 36, and XXI, Rec., p. 41).

Accepting the theory of the opinion of this court to be true (excepting only the conclusiveness of a presumption of law, arising from the mere act of refusing an extension, that the engineer did give a judgment on the question of prevention by freshets without fault during the last extension), we submit that it is a legally found and established fact for this court that the engineer never did give the judgment to which, as you have said, "the parties agreed" the contractors "should have the benefit of."

But, referring to this finding, your honors say:

> "But as it was expressly alleged in the petition and was found by the court, that, on an application for a further extension because of interruption occasioned by force of elements and not by any fault of the plaintiff, the engineer did refuse to extend, the statement of the court must mean either that it was necessary for the engineer, in order to give efficacy to his decision, to declare in terms that it was based on a finding of fault on the part of the contractors, or that the conclusion of the engineer did not amount

to a decision or judgment, within the meaning of the contract, because the court reached a different conclusion.

"These are propositions of law and not of fact, and we cannot assent to either of them."

We think your honors have here misunderstood the position of the lower court.

There is no doubt about the fact that the engineer did refuse to extend, but we submit that it is an error to say that the finding "must mean" either of the things, one or the other, of which your honors infer that it "must mean,' and that the "propositions of law" mentioned in the opinion were therefore not involved in the finding of the lower court, but arise entirely from this court's inference based on a misconception of the true meaning of the finding.

By way of preface to what we shall say in support of this assertion, we suggest that the "judgment or decision" referred to in the finding is not the mere act of the engineer in *refusing* an extension, but is the "judgment" of the engineer referred to in the freshet proviso in the contract, namely, his judgment on the question of prevention by freshets. A mere *refusal* to extend is a very different thing, for, as we have seen, a refusal to extend might occur as the mere act of a *party* to the contract without any judgment whatever as to the cause of prevention. The engineer might have refused to extend whether he judged that there had been prevention solely by freshets, or that there had not been, or without judging that question at all. Suppose when the extension was made he had gone away and had never seen or heard of the work or the condition of it afterwards, but at the end of the extension had sent a writing, saying, "I refuse to extend the contract," would such refusal have necessarily involved a judgment on the question of prevention by freshets? We are not discussing fraud here, but simply whether a refusal affords a

conclusive legal presumption of a judgment. We grant that his refusal may create a presumption that he did render a judgment. But is it conclusive? May it not be rebutted by showing that in fact he never rendered it? If so, may the trial court not find the fact?

Now, the first of the two alternative things, which the opinion says the finding "must mean" when it says that "no judgment or decision was given by said engineer" as to prevention by freshets, "nor did he find or decide that the claimants were not so prevented," is "that it was necessary for the engineer, in order to give efficacy to his decision, to declare in terms that it was based on a finding of fault on the part of the contractors." This your honors then properly say would be an erroneous conclusion of law. We submit, however, that this is not the conclusion of the trial court either expressed or inferable from its finding. It is based upon this court's assumption that the mere refusal of the engineer to extend the contract period was a judgment by the engineer that the contractors had not been prevented solely by freshets from completing the work, an assumption which we have already, we think, shown not to be warranted by the findings.

Certainly we have never contended or thought "that it was necessary for the engineer, in order to give efficacy to his decision, to declare in terms that it was based on a finding of fault on the part of the contractors," nor do we for a moment suppose the lower court did so. Assuming the correctness of your honors' conclusion that the freshet clause empowered the engineer not only to judge for the contractors what amount of time would be "just and reasonable" in case of prevention by freshets, but also to judge whether they were so prevented, we do not at all contend that he must "declare in terms" anything. The contract is silent on the subject; the law makes no such requirement, but we do contend that he must *decide* something in addition to a mere refusal to extend the time. We do

contend, in the language of the opinion, that "the parties agreed that if the contractors should fail to complete their contract within the time stipulated they should have the benefit of the judgment of the engineer whether such failure was the result of their own fault or of forces beyond their control, and, in the latter event, of his judgment as to what extension of time would be just and reasonable." And we contend that, having a right to this judgment, they had a right to have the trial court find as a fact whether they got it—in other words, whether as a matter of fact the engineer ever gave any such judgment (the *benefit* contracted for). It has so found. It declares he never gave any; that he never decided that the contractors were not so prevented or decided at all the question whether they were or not.

The engineer having wholly failed to perform this duty, his mere refusal to extend was, we submit, a breach of the contract.

The second of the two alternative things which the opinion says the finding of the lower court "must mean," when it says that the engineer never in fact gave any judgment or decision on the question of prevention by freshets, is "that the *conclusion* of the engineer did not amount to a decision or judgment within the meaning of the contract, because the court reached a different conclusion."

No "conclusion" appears in the findings. We understand, however, that your honors mean by "conclusion of the engineer" merely his *refusal* to extend, and thence infer as a legal conclusion that the act of refusal was the act of the engineer, not as a party to the contract, but as judge between the parties, and then upon that conclusion base a second and irrebuttable conclusion, namely, that his refusal was based upon, and therefore tantamount to, a judgment that there had not been prevention by freshets without fault.

We would suggest, first, that there was neither in fact nor by presumption of law any such "conclusion of the en-

gineer," as the opinion assumes, and, secondly, that the assumption violates another rule of law: that there shall be no presumption upon a presumption.

Had the substantive fact been established that the engineer did give a judgment on the question which the contract submitted to him, there would be a basis for a presumption that the judgment covered that question; but, as this court said in U. S. *vs.* Ross, 2 Otto, 281:

> "It is obvious that this presumption could have been made only by piling inference upon inference and presumption upon presumption." "The presumption that public officers have done their duty, like the presumption of innocence (a rebuttable one), is undoubtedly a legal presumption; but it does not supply proof of a substantive fact." "Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or law is reliable drawn from premises which are uncertain."

In the present case, with absolutely nothing to show that the engineer ever in truth decided or intended to decide the question of prevention by freshets during the period of extension (or for that matter during any other period), the opinion, as we understand it, from the one fact of refusal to extend, makes this series of inferences: *First*, that the refusal must have been by the engineer in his capacity of judge, and, upon that, *secondly*, that he must have decided the question of prevention by freshets, and upon that, *thirdly*, he must have decided it adversely to the contractors, for, *ex hypothesi*, "the parties agreed" that contractors "should have the benefit of the judgment of the engineer" on that question, and he could not "have based his refusal for a further extension upon the *sole* ground that there had been delinquencies during the prior periods of extension," and therefore must have based them at least in part upon delinquencies during the last extension.

And this brings us to the proposition that the findings show unerringly that in fact, if the engineer could be said to have decided anything or to have given or intended to give any judgment whatever, *such a judgment must have been based "upon the* SOLE *ground that there had been delinquencies during the prior periods of extension."*

Aside from the *conclusive* presumption of law, which we have sufficiently discussed, and which we think your honors will agree is untenable, all the facts as to what the engineer did base his refusal on are shown in findings X and XXI.

Now, those findings show, first, that he gave "no judgment or decision" whatever concerning delinquencies during the last extension, and, secondly, that he based his refusal to extend *exclusively* on the mere fact that "the claimants had for a number of seasons *failed to complete* the work within the times agreed upon." Now, we submit that there is no other source of information for this court as to what the engineer did or did not do in this regard aside from these findings. It seems clear, and we understand from the opinion that your honors hold, that the affidavit of the engineer filed in the court below on the motion for a new trial cannot be considered here or militate against the findings. We discussed this matter fully in our first brief.

When, therefore, the engineer based his refusal upon the mere fact that "the claimants *had* for a number of seasons *failed to complete* the work within the times agreed on," we submit, in the first place, that this has nothing whatever to do with the causes of prevention during the last extension, which "the parties agreed" the contractors should have the right to have his judgment on, and, secondly, failure to complete during the prior periods of extension not only could not, as your honors say, be "the sole ground" of a refusal to extend, but such mere failure to complete in nowise shows any fault on the part of the contractors. So

far as the findings show, not only may the failure to complete have been waived, but it may even have been due to the act or orders of the Government itself. As the lower court said: "Both parties treat the extensions as having been made upon sufficient grounds. * * * Whatever delays or defaults on the part of the claimants may have occurred prior to the last extensions of the contracts were waived by the defendants, and once waived cannot be revived" (R., 44). We understand the opinion of this court recognizes this to be the law. (We submit that it is the law, and refer to our brief concerning it.)

But this court's opinion says:

> "It was further suggested by the court below, and has been vigorously pressed upon us in the argument, that the engineer in charge was improperly influenced in refusing the third extension asked for, by a consideration of delinquencies in previous years, whereas it is claimed that the extended contracts were, in respect of their several dates, new contracts, the performance or non-performance of which did not depend upon anything done or omitted to be done thereunder prior to the last extension.
>
> "It may be that, by granting the previous extensions, the right of the Government to forfeit the compensation already earned and withheld under the terms of the contract was abandoned; but to say that the engineer in charge, when applied to for a third extension, may not take in view previous delinquencies and the futility of the extensions theretofore granted, seems to us quite unreasonable. He might well think that his duty to the Government and to the public interested in the early completion of the work forbade a *further experiment* in that direction. An indefinite succession of extensions was surely not within the contemplation of the contract. We do not wish to be understood to say that it would have been competent for the engineer in charge, if in his judgment the contractors *had been duly diligent during the period of the last extension* and had acted up to the conditions upon which such extension was granted,

> to have based his refusal for a further extension upon the *sole* ground that there had been delinquencies during the prior periods of extension. We mean merely to say that, in a *bona fide* exercise of the discretion conferred upon him, that officer might properly observe the conduct of the contractors through the entire scope of their past action, in deciding what weight to give to their *promises* as respected the future, and consider whether previous grants of extension had brought forth such efforts on the part of the contractors as the circumstances required."

We would respectfully point out what it seems to us should be reconsidered in this reasoning of the court.

In the first place, our contention has been not merely "that the engineer in charge was improperly influenced in refusing the third extension asked for by a consideration of delinquencies in previous years," but that he did base his refusal "*solely*" upon such "delinquencies," if we admit that the mere fact that the contractors "failed to complete the work" was a delinquency, and this notwithstanding there is no finding of fault as to the causes of such failure, and notwithstanding waiver of any such faults by the extensions. There are two expressions in the quotation we have given of the language of the opinion touching the right of the engineer to consider delinquencies in previous years, to which we desire to call attention. Your honors say that "he (the engineer) might well think that his duty to the Government and to the public interested in the early completion of the work forbade a further experiment in that direction"—that is, in extending the contract period. We may infer from finding X that this was precisely the engineer's idea. We submit that that would be unfair and erroneous. It is plain from the contract, and it is held in this court's opinion, that under the freshet proviso the engineer was to act as a judge between the parties touching the question of prevention by freshets without fault; that they had a *right* to his judgment on that question, and that if in his judgment they were so pre-

vented they had the further *contract right* to his judgment as to the amount of additional time to be allowed them. This being true, we submit, in the first place, that the engineer's "duty to the Government and the public" should no more have controlled his judgment or his action than his correlative duty to the contractors, and, in the second place, that it was not a question of "further experiment" in granting extensions, but if in the engineer's judgment the flooded condition of the river alone prevented completion in 1888, it was a question simply whether the contractors should have or be denied the just and reasonable extension which the contract guaranteed to them.

Again, pursuing the same line of reasoning (and, it seems to us, considering the engineer as if he were acting under the freshet proviso for his principal alone), and after saying that while he could not lawfully "have based his refusal for a further extension upon the *sole* ground there had been delinquencies during the prior periods of extension," your honors say: "That officer might properly observe the conduct of the contractors through the entire scope of their past action in deciding what weight to give to their *promises* as respected the future, and consider whether previous grants of extension had brought forth such efforts on the part of the contractors as the circumstances required." We submit that there is no question here of "promises" or the probable carrying out of promises, but only of the stipulations contained in the already existing contract itself. Your honors have to construe and give proper effect to a *contract*. Granting fully the correctness of the court's construction of the freshet proviso and the very ample extent of the engineer's power, and granting every presumption in favor of his proper exercise of that power, we still respectfully submit that when the extension for 1888 was given the contractors, subject only to the judgment of the engineer as to the cause of prevention that year, they had the contract right to such additional time as he should judge reasonable;

that this court has so held; that otherwise the declaration in the opinion that "the parties agreed that * * * they should have the benefit of the judgment of the engineer," etc., and the other declaration that it would not "have been competent for the engineer * * * to have based his refusal for a further extension upon the *sole* ground that there had been delinquencies during prior periods of extension" can mean nothing, and, finally, that whether the engineer thought that the previous conduct of the contractors gave promise of completion of the work within such "just and reasonable" additional time or not was entirely immaterial. Unless this court is willing (and we are sure it is not) to adopt the extraordinary contention for the appellant that the freshet proviso has been in some way eliminated from the contract by the extensions, or is willing to hold that even if the engineer himself judges that during the last extension unprecedented floods alone made any work whatever impossible, he still has the right to refuse any additional time whatever, then we submit that if the engineer finds that the last extension has thus been rendered valueless solely by the floods, the contractors have the contract right to "just and reasonable" additional time without making any "promises" whatever and regardless of what the engineer may think either of such promises or the conduct of the contractors prior to the last extension. If this be not true, then when the contractors entered into this contract to excavate the bottom of this swift river at the falls, and stipulated that if they should be unavoidably delayed by freshets they might be allowed additional time, such as, in the judgment of the engineer, would be just and reasonable, they were not contracting for a beneficial protection nor, as the opinion says, "for the benefit of the *judgment* of the engineer," but for the merest "grace" of the other contracting party—a grace which in nowise depended upon the *contract*, but on the *graciousness* of that party. We do not so understand the opinion or the law.

II.

Concerning the first proposition held in this court's opinion, namely, that the freshet proviso vests the engineer with the discretion to judge for both parties to the contract not only what amount of time would be just and reasonable to be allowed the contractors in case of prevention by freshets without fault of their own during the last period of extension, but also to judge whether there was such prevention by freshets, we desire merely to call attention to two vital points not discussed in the briefs.

It will be remembered that our first contention was that in the first clause of the freshet proviso, which states fully the condition of extension, "*If (the contractors) shall by freshets, ice, or other force or violence of the elements and by no fault of his or their own be prevented either from commencing or completing the work or delivering the material at the time agreed upon in this writing,*" the engineer is not mentioned, and that neither in this clause nor in any of the language following is the question of such prevention *expressly* referred to his decision. (The opinion says nothing to the contrary.) We then argued that if the engineer was made judge, both for the Government and the contractors, of the happening of the contingency of such prevention solely by freshets, his authority in this respect must be *implied* from the next clause, which says, "*such additional time may in writing be allowed him or them for such commencement or completion as in the judgment of the party of the first part or his successor shall be just and reasonable.*"

The opinion does not say whether such implication is warranted by any rule of construction recognized in the law; but it does hold (and we must presume by implication from some word or words in this second clause) that the engineer was by the freshet clause made arbitrator or judge to decide, not merely for his principal, but for the contractors,

whether, as a matter of fact, the freshets did make the completion of the work impossible.

Your honors say:

> "The contract fixes the time within which the work must be completed, but provides that in case failure to complete is providential and without fault, such additional time may be allowed as the engineer may judge to be just and reasonable.
>
> "As then his granting of additional time would be final and irrevocable, so his refusal to allow it was necessarily final. The privilege of procuring an extension of time is conditional on the action of the officer, whether he grant or refuse it."

We submit that these conclusions do not necessarily follow. To say that his "granting" or his "refusal" was "necessarily final" assumes that his mere act of granting or refusing necessarily presupposes, as a conclusive presumption of law, that he had given the judgment on the question of prevention by freshets for which this court says the contractors agreed and which was a condition precedent to a lawful granting or refusal. Such a conclusive presumption, we have seen, is unwarranted. Whilst under this court's construction of the freshet proviso we may grant that a judgment on this question would be final, we submit that when the finding is that no such judgment was ever in fact given, the mere act of granting or refusing was not "final."

Again, the same reasoning applies to the other statement that "the privilege of procuring an extension of time is conditional on the *action* of the officer, whether he grant or refuse it." On the contrary, we submit that the privilege was conditional upon the *judgment* of the engineer as to the cause of prevention; and if any such judgment had been in fact given by him, that would have determined the existence of the privilege. And yet, as we have seen, the action of the engineer may have been taken whether he recognized or disregarded such a privilege.

Again, your honors say, "By changing the phrase 'such additional time may be allowed' into the phrase 'such additional time shall be allowed,' the court below substituted for an appeal to the discretion and decision of the officer an absolute right to have the question of prevention determined by the court." Waiving here, because not germane to the subject in hand, any question as to the assumption in this proposition that the question of prevention was within the engineer's province, we would suggest that neither the lower court decided nor have we contended for a substitution of the court's decision for that of the engineer. We did claim that the question of prevention was not within his province. Waiving that now, we do claim, and this court has held, not that the decision of the court shall be "substituted for an appeal to the discretion and decision of the engineer," but that there must have *been* such a decision of the engineer or a breach of the contract. The lower court finds as a fact that there was no such decision, and (the province of decision on the part of the engineer being in that event immaterial) it then holds there was a breach, finds the damages and gives judgment for them.

If, as this court holds, this freshet proviso was intended to give the contractors a substantial legal right, namely, the right to the engineer's judgment on the question of prevention and as to the amount of time to be allowed them in case of prevention by freshets without fault, we submit that this right must necessarily be deduced from the words "may be allowed them." There are no others from which it can be implied. We ask the court to consider if this is not true. The first clause of the proviso does not mention the engineer. It merely states the contingency of prevention by freshets without fault as a condition precedent to what follows. Then comes the language of the second clause: "*Such* additional time may in writing be allowed (them) *as* in the judgment of the (engineer) shall be just and reasonable."

Now, the question here is not whether, within its proper sphere, the judgment of the engineer is "final," but what is the extent of that sphere of judgment. Your honors, combating an illustration which we think was intended to relate to a different matter, say (p. 9): "It is obvious that, from the very nature of the case, the decision of the engineer * * * must be final." We may grant that any decision he really gave was final; but the question here is not as to the finality of his decision, but whether the words "such additional time may in writing be allowed (them) * * * as in the judgment of the (engineer) shall be just and reasonable" either expressly or impliedly refer to his judgment the happening of the contingency stated in the preceding clause. We contended that, as these words do not say that "such additional time may be allowed * * * *by the engineer*," but can as well be allowed directly by the contract itself, *ex proprio vigore*, there is no warrant for resorting to implication and interpolating those words, "by the engineer," after the word "allowed," and thus extending the sphere of his judgment so as to include not only the amount of time, which is expressly referred to him, but the act of God, which is not expressly referred to him. Counsel for appellant contended that the word "may" left both these matters to the mere "grace" of the engineer, and gave no privilege or right to the contractors, but only a privilege to the other party to the contract. Your honors, as we have seen, have repudiated this view and held that under the freshet proviso the contract gave the contractors a *substantial right*—namely, the "agreed" right to "have the benefit of the judgment of the engineer as to whether such failure was the result of their own fault or of forces beyond their control, and in the latter event of his judgment as to what extension of time would be just and reasonable."

Now, if it can be and is made to appear to this court (we are not saying it can be or is; we have discussed that else-

where) that the engineer denied them this right, then there has been a breach of the contract; otherwise the language quoted from the opinion would mean nothing.

But if, upon the happening of the contingency of prevention by freshets without fault, the word "may" in the clause "additional time may be allowed them" can thus of *its own force* give them the limited right to "such additional time" upon the engineer's judging that there was such prevention, then *why may not the very same words, of their own force, give them broader right to such additional time without the engineer's judgment* (except as to the amount of such time)? Why imply a power to him and substitute the force of his judgment for the force of the contract and leave the allowance of additional time to the engineer rather than to the contract itself?

Without going into any detailed argument, we submit that such an implication would be a forced one and contrary to all the rules of construction stated in our brief.

It implies when implication is not necessary to give full effect to the language used. It construes the words most strongly in favor of the party drawing the contract. It creates by implication an entirely exceptional and very extraordinary power in one party (the agent of the real party) to bind the other party in a matter of the most obvious and vital importance.

All this is so contrary to what seems to us the technical law, as well as the substantial justice of the case, that we earnestly beg a reconsideration of it.

The opinion says: "Obviously the object of the provision in question was to prevent the very state of dispute and uncertainty which would be created if the present contention of the contractors were to prevail." We respectfully submit that there was another and a vastly more important object of the provision, and that was to provide that if the act of God alone, without any fault whatever of the contractors, should make the work impossible, the contractors

should have such additional time as "shall be just and reasonable." The mere fact that the engineer is *expressly* made judge of the *amount* of time, surely gives no reason for *implying* a power in him to judge for the other party whether the act of God alone has prevented completion of the work.

Again, the opinion, after saying that the engineer might well think his duty to the Government forbade a further experiment in extension, says: "An indefinite succession of extensions was surely not within the contemplation of the contract." We concede this. We suggest, however, that so far as past extensions under this particular contract are concerned, the reasons for them are not known and they are irrelevant to the construction of the contract. The question is whether, when the contract was in fact extended for 1888 and the contractors not merely induced, but required to make large outlays on the faith of it, they should, although prevented from completing the work solely by obvious and irresistible act of God, be denied, *not* "an indefinite succession of extensions," but "such additional time * * * as may be just and reasonable." In truth, there is and can be no danger of such indefinite extensions. As we have shown in our brief, every extension under both of these contracts was given only because it was "in the interest of the Government." The engineer evidently considered himself solely as an agent of the Government and not as a judge between the parties bound to do justice to both alike. Under our construction of the contract the Government is at no disadvantage. Quite the contrary. The contractors would have no right to "additional time, * * * just and reasonable," unless necessarily notorious floods are the sole cause of delay, and then only such time as the other party to the contract fixes. Under such a contract we earnestly ask which construction best does substantial justice?

III.

Since the affidavit of Major Stickney is referred to in your honors' opinion (p. 10), we call the attention of the court to the fact that in it the engineer confesses that a reason for his refusal to grant a further extension was "that they (the contractors) had not fulfilled the conditions upon which the time had already been extended." Surely the contracts did not make him the arbitrator or final judge of this. It was open for the Court of Claims to decide this fact for themselves, and they found that the *conditions had been fulfilled* (Finding VIII).

IV.

The general conclusion of the opinion, that the contractors are not entitled to the profits claimed, may have been approved by your honors partly because of a belief that it does not appear from the findings that the contractors would have performed the remaining work within any reasonable time.

It is therefore here suggested, as to this point, that the findings show that with a certain plant the contractors had excavated 35,435.22 cubic yards (Finding XII). They then practically *doubled their plant* (engineer's letter of December 31, 1887, in Finding IV, and Finding VIII), so that it was capable of excavating 640 cubic yards a day (Finding VIII). There remained to be excavated 83,500 cubic yards (Finding XII).

It is therefore a mere matter of arithmetic to ascertain, by dividing 640 into 83,500, that the contractors could reasonably have performed the remaining excavation in 131 days.

The findings, therefore, *do* show that the remaining work could have been performed within a reasonable and *definite* time.

The above refers to the Upper work. In the Lower work hardly anything remained to be done.

We respectfully submit that, whether or not your honors may consent to again consider the meaning of the contracts, in any event the engineer's failure to give any judgment, such as your honors find "the parties agreed" that the "contractors should have the benefit of," was a clear breach of the contracts, and should move the court to grant the rehearing prayed for.

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